

October 15, 2019

Elizabeth Berlin
Interim Commissioner
New York State Education Department
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Albany, New York 12234

Richard A. Carranza
Chancellor
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Dear Interim Commissioner Berlin and Chancellor Carranza:

We are a group of legal services organizations and attorneys who advocate for the families of New York City children who have disabilities requiring special education. We write to raise significant concerns that the New York City Department of Education (“NYCDOE”) is habitually failing to meet its obligations under the Individuals with Disabilities Education Act (“IDEA”), its implementing regulations, and New York State Department of Education (“NYSED”) regulations to provide impartial due process hearings, conducted by Impartial Hearing Officers (“IHOs”), in a timely manner.

The purpose of this letter is to reiterate NYCDOE’s and NYSED’s legal obligations to provide due process hearings in a timely manner; present real world examples of the educational impacts these delays are causing; offer practical solutions to begin to curb this problem; and **request an immediate meeting with State and City decision makers to discuss our concerns.**

Through our advocacy for children and parents, we have all personally witnessed these illegal delays and the impacts they have on some of the most vulnerable children in New York City. This letter should not come as a surprise. For years, NYSED has “documented that parents/guardians of students with disabilities are not being provided timely access to an impartial hearing upon the filing of a due process complaint notice with NYCDOE,”¹ and that

¹ New York City Department of Education Compliance Assurance Plan, May 2019 (New York State Education Department, Office of Special Education) (“CAP”), Attached as Exhibit A, at 2.

“NYCDOE fails to provide parents access to adequate due process after a complaint has been filed.”²

NYSED has concluded that “NYCDOE has multiple outstanding findings of noncompliance involving the requirements to ensure proper procedural safeguards to students and parents, and the provision of programs and services to preschool and school-age students with disabilities,” and that despite NYSED’s efforts to work with NYCDOE to resolve these issues, those efforts have “not resulted in the systemic change necessary to sustain compliance and/or scale-up effective approaches to ensuring compliant policies, procedures, and/or practices in the identified areas.”³

NYCDOE Fails to Meet Its Obligations to Provide Timely Due Process Hearings

The right to challenge adverse special education determinations through the complaint and hearing process is among the most critical protections the IDEA provides to parents. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 205 (1982) (“[T]he importance Congress attached to [IDEA’s] procedural safeguards cannot be gainsaid.”). Integral to these procedures are strict timelines imposed by federal and state law. Both federal and state regulations explicitly require that an IHO issue a final decision on any due process complaint no later than 45 days after the expiration of the 30-day resolution period. 34 C.F.R. § 300.515(a); 8 N.Y.C.R.R. § 200.5(j)(5). New York state law further protects parents’ right to timely determinations on their due process complaints by, for example, requiring that the hearing process begin within the first fourteen days of the federally-mandated resolution period, prohibiting appointment of IHOs unable to meet that deadline, and severely curtailing the circumstances in which the mandated timeframes may be exceeded. *See, e.g.*, 8 N.Y.C.R.R. § 200.5(j)(3)(iii)(b) (fourteen-day requirement); *id.* § 200.5(j)(3)(i)(b) (IHOs); *id.* §§ 200.5(j)(5)(i)–(iv) (limits on granting extensions of time).

As courts routinely recognize, the time constraints on due process hearings are fundamental to the IDEA’s statutory scheme. “[The] failure to provide a timely due process hearing to plaintiffs is not an unimportant or technical violation of the procedural safeguards provided for in the IDEA. Rather, it is the denial of a fundamental component of the due process protections afforded by the statute.” *Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 78 (D.D.C. 2003). The reason is clear: delay causes immediate and real harm to the students IDEA is designed to protect. “[T]he brevity of the 45–day requirement indicates Congress’s intent that children not be left indefinitely in an administrative limbo while adults maneuver over the aspect of their lives that would, in large measure, dictate their ability to function in a complex world.” *Engwiller v. Pine Plains Cent. School Dist.*, 110 F. Supp. 2d 236, 240 (S.D.N.Y. 2000). As a practical matter, the failure to timely adjudicate due process complaints often has the effect of denying children their statutorily mandated free appropriate public education (“FAPE”), and a sufficiently egregious delay “can itself constitute the denial of a free appropriate education.” *Blackman*, 277 F. Supp. 2d at 79; *see also Schmelzer ex rel. Schmelzer v. New York*, 363 F. Supp.

² *Id.*, at 18.

³ *Id.*, at 1.

2d 453, 459 (E.D.N.Y. 2003) (“Inordinate delays in the decision making process deprive those students of the rights provided to them under the IDEA and cause those students to suffer irreparable harm.”).

The responsibility for ensuring compliance with these critical deadlines rests with NYCDOE and, ultimately, with NYSED. 20 U.S.C. § 1412 (a)(11)(A); 34 C.F.R. § 300.149(a) and 300.515(a)–(b); and 8 N.Y.C.R.R. § 200.5(j)(3). Egregious delay gives rise to liability by those actors, from which affected students may seek legal redress in court, including on a class basis. *See, e.g., Blackman*, 277 F. Supp. 2d at 79, 85–89 (granting preliminary injunction in lengthy class litigation to redress systemic delays in District of Columbia due process hearings); *L.V. v. N.Y.C. Dep’t of Educ.*, No. 03 Civ. 9917, 2005 WL 2298173, at *8 (S.D.N.Y. Sept. 20, 2005) (granting certification to class of students harmed or at risk of being harmed by systemic delays in implementing IHO decisions); *Schmelzer*, 363 F. Supp. 2d at 459–62 (certifying and granting summary judgment to class harmed by State Review Officers’ violations of federal timeliness requirements).

NYCDOE has woefully failed to meet its obligations to timely provide due process hearings. As described in the CAP, “NYCDOE has been identified as not meeting the requirements of IDEA for 13 consecutive years due to performance and/or compliance outcomes for the subgroup of students with disabilities”⁴ (emphasis added). As NYSED put it, NYCDOE is “a district that needs intervention in implementing these requirements.”⁵

The CAP is replete with descriptions of NYCDOE’s failure to meet required deadlines, including specifically that “NYCDOE fails to afford students with disabilities and their parents with required procedural safeguards.”⁶ An independent report commissioned by NYSED found that the “average number of days a case is open in New York State far exceeds the abbreviated timeline established in the IDEA and what is reasonable under an extended timeline.”⁷ For example, in the 2017-2018 school year, the average number of days a case was open (“case length”) in New York City was 202 days.⁸ In the 2018-2019 school year, it was 225 days.⁹ By comparison, the average case length in the rest of New York State was 120 and 140 days in 2017-2018 and 2018-2019, respectively.¹⁰ As described in the External Review, this “failure to

⁴ *Id.*, at 2.

⁵ *Id.*

⁶ *Id.*, at 18.

⁷ External Review of the New York City Impartial Hearing Office, February 22, 2019 (Deusdedi Merced, Special Education Solutions, LLC) (“External Review”), attached as Appendix B, at 18.

⁸ *Id.*, at 19.

⁹ *Id.* (as of January 2019).

¹⁰ *Id.* (as of January 2019).

promptly resolve due process complaints keeps children in ‘administrative limbo’ and, for some, delays access to free appropriate public education to which they are entitled.”¹¹

The independent report found that in the 2016-2017 school year, of the due process complaints that resulted in written decisions, only 14% were decided within the mandatory 45-day timeline.¹² The majority—71%—were decided within extended timelines, and 15% were untimely.¹³ The report assumed the extended timelines were based on valid requests, but stated that there have been allegations of IHOs unilaterally extending the timelines absent valid requests,¹⁴ something we have experienced firsthand. Indeed, according to the External Review, the number of extensions granted in New York State is “exceptionally high,” and New York City accounted for over 95% of all extensions granted in the 2015-2019 school years.¹⁵ For example, in the 2017-2018 school year, of 36,369 extensions granted state-wide, 35,157 (or 97%) were in New York City.¹⁶

IHOs in New York City also have a “startling” number of recusals, with 5,634 in the 2017-2018 school year (compared with 30 in the rest of the state), and 6,968 recusals as of January 2019 in the 2018-2019 school year (compared with 11 in the rest of the state).¹⁷ Significantly, the vast majority of these recusals relate to scheduling and availability, not substantive matters.¹⁸ The “disproportionate number of recusals are an impediment to the timely completion of due process hearings.”¹⁹ Overall, the External Review concluded that “these systemic deficiencies are symptomatic of an unhealthy hearing system that requires immediate intervention.”²⁰

¹¹ *Id.*, at 18–19.

¹² *Id.*, at 15.

¹³ *Id.*

¹⁴ *Id.*, at 15 n.41. See, 34 CFR § 300.515(c); and 8 NYCRR 200.5(j)(5)(i) (“The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason.”).

¹⁵ *Id.*, at 16–17.

¹⁶ *Id.*, at 17.

¹⁷ *Id.*, at 17–18.

¹⁸ *Id.*, at 17 n.48 (explaining that the term “recusal” is a “misnomer” in this context, because IHOs are assigned “on an automatic rotational appointment basis” and “[a]n IHO who is appointed but simply unavailable, or . . . chooses not to accept the appointment, is deemed to have recused him/herself”).

¹⁹ *Id.*, at 17.

²⁰ *Id.*, at 20.

These Delays Cause Serious Harm to New York City Children

These egregious and systemic delays are continuing to cause material, demonstrable harm to the children we represent. Every day of delay is another day that these children miss out on critical services they need to develop and learn. And these delays disproportionately affect low income children whose families do not have the means to pay for the services they require on their own while waiting for their claims to be processed. Below are several examples of children experiencing real injury from NYCDOE's delays. As these families' experiences make clear, many compounding dysfunctions contribute to the delays, including multiple recusals by successive IHOs, overburdened and overscheduled IHOs, unexplained gaps between hearing dates, delayed transcripts, improperly entered compliance deadline extensions, poor communication from NYCDOE and the Impartial Hearing Office, and an inefficient process and protocol for reaching settlement in uncontested cases. These dysfunctions led to between six and twelve months of delay in the below examples, including one student whose hearing still has not yet been completed and another who is still waiting on a decision after a hearing.

Zachary Wang²¹ is a 10-year-old boy with emotional disturbance whose school failed to implement his IEP. Zachary's aunt requested a due process hearing in February 2019. An IHO was assigned immediately, but replaced without explanation three weeks later by a new one, who in March scheduled a hearing in late June. The night before the June hearing, the IHO recused himself, citing an inability "to conduct the hearing in a timely manner." Several IHOs subsequently were assigned and recused themselves without explanation. Counsel later learned that many of these IHOs had, on their own and without a request from either party, extended the compliance deadline without notice to either party. The seventh assigned IHO scheduled a telephonic hearing in August, but then, without notice, failed to appear for it because, as he later acknowledged, he had seven other matters that morning. Only after counsel wrote NYSED was an IHO assigned who could timely hear the matter. At the pre-hearing conference in August, NYCDOE offered a settlement for the first time, after other NYCDOE representatives had refused Zachary's settlement requests for months on the ground that they lacked authority to agree to a settlement.

Matthew Adebayo is a non-verbal 8-year-old with autism and developmental delay, who engages in constant aggressive behaviors. For two years, NYCDOE paid an independent agency to provide Matthew 20 hours per week of home-based behavior management services, leading to significant progress. In March 2019, NYCDOE issued an IEP discontinuing the services. Matthew's parent filed a due process complaint in April 2019, but the earliest hearing date permitted by the assigned IHO's packed schedule was September—and even then, for only two hours a day, so the hearing would take three nonconsecutive days spanning three weeks. Matthew's services ended in June 2019, but the hearing was completed only on September 19. No decision has yet been issued. Because his family has been unable to pay for services in the meantime, Matthew has regressed nearly to his levels of aggressive behavior from two years ago.

²¹ The names and certain identifying features have been changed to protect the privacy of the students.

Paul Stoddard is a 12-year-old with autism, attention-deficit/hyperactivity disorder, and intellectual development and adjustment disorders. Following severe academic and behavioral problems, Paul's parents requested a due process hearing on June 29, 2016. A hearing was calendared for September, but in late August NYCDOE told Paul's parents the case would settle, and thus requested an adjournment to October 31. NYCDOE did not follow up, however. In November 2016, the IHO recused himself and a new one was appointed. Then, the parents heard *nothing* until February 2017. After counsel's inquiry, the Impartial Hearing Office stated that two adjournments had been granted to prepare witnesses—but no party had requested or even knew about those. That IHO recused himself, on Paul's parents' request, and a third IHO scheduled a hearing for May 1. In April, NYCDOE first told counsel the case had been settled, but a week later, NYCDOE informed parents that the case was in fact rejected for settlement. The hearing began on May 1, but was continued until June 21 because of the IHO's schedule. Ultimately—more than a year from the filing date, during which time Paul struggled behaviorally and academically—the IHO ruled for Paul's parents.

Dario Kahler is a third grader with a speech and language disability. His mother's requests to restore speech and language therapy, which NYCDOE had discontinued, and for a paraprofessional, were denied. Dario's mother filed an impartial hearing request in February 2018 and subsequently amended it, but the Impartial Hearing Office apparently never received the amended request. Counsel resubmitted it in July 2018. Although NYCDOE conceded it had denied Dario a free appropriate public education, and granted the services and a paraprofessional in December 2018, it refused compensatory services. The IHO did not hold a hearing until the end of January 2019, and the Impartial Hearing Office did not provide the transcripts until *June* 2019—almost *six months* after the hearing and eighteen months after the original request. To date, the IHO has not issued a decision. Dario has thus started school without the services he needs to compensate for NYCDOE's admitted denial of a free appropriate public education.

Maria Mulloy is a 12-year-old with emotional disturbance whose self-contained class and related services were inadequate to meet her needs. On August 31, 2018, Maria's mother filed a due process complaint. On September 10, 2018, an IHO was assigned, but the IHO did not hold the hearing until seven months later, on April 10, 2019. NYCDOE did not appear or contest the allegations. The Impartial Hearing Office did not provide the transcript until almost three months later, and did not issue a final decision granting her services until August 30, 2019—a *full year* after her mother filed the hearing request.

Recommended Priorities

In light of the deficiencies in the current process, NYSED and NYCDOE must take immediate steps to address the following priorities, each of which is critical to protecting our clients' federal and state rights to timely obtain hearings and resolutions of their cases.

Timely Obtaining a Hearing

1. **Appoint Additional IHOs.** NYSED should appoint substantially more IHOs to meet the need for adjudicating complaints, including by increasing its recruiting outreach

efforts. The current number of IHOs—71 in fiscal year 2018²²—is vastly insufficient to meet the number of hearings requested in New York City: over 7,100 during the 2017-2018 school year.²³

2. **Improve IHO Compensation.** NYCDOE should (a) revise the IHO compensation scheme to fairly compensate officers; (b) timely compensate IHOs; and (c) develop compensation approaches that will incentivize IHO conduct that promotes timely and compliant resolution of complaints. Currently, “[i]nadequate compensation has resulted in IHOs engaging in widespread practices that are inconsistent with appropriate, standard legal practice and best practices.”²⁴
3. **Improve Case Management for IHOs.** NYSED/NYCDOE should limit the number of cases that can be assigned at one time to an IHO, limit the number of cases IHOs can calendar on one day, and create transparency in case selection so as to limit unnecessary and multiple recusals. Currently, for example, NYCDOE “automatically appoint[s] an IHO to a due process complaint without first confirming his/her availability,” which “is inconsistent with the regulatory requirement” and “is the primary reason for the high number of recusals in New York City.”²⁵
4. **Additional Hearing Offices.** NYCDOE should establish a hearing office in each borough, similar to the structure of the NYCDOE suspension hearing offices. Having multiple locations would help with the overcrowding in the current hearing office and streamline the hearing process. “[Eleven] hearing rooms is simply not enough, when on average in the past two school years, there have been over 100 matters on the calendar per day.”²⁶
5. **Improve the Hearing Spaces.** NYCDOE should provide additional space to conduct hearings, as well as separate waiting rooms for NYCDOE and parents/representatives so that the parties can have confidential conversations. “The absence of a designated area for parent attorneys/advocates to have confidential discussions with their clients hinders the right of parents to be” advised by counsel.²⁷
6. **Hire Additional Hearing Office Staff.** Given the delays experienced in the Impartial Hearing Office, NYSED/NYCDOE should hire more personnel for the office.

²² External Review, at 34.

²³ CAP, at 19.

²⁴ External Review, at 31.

²⁵ *Id.*, at 43.

²⁶ *Id.*, at 37.

²⁷ *Id.*, at 39.

Timely Obtaining Resolution

7. **Improve the Settlement Process.** NYSED/NYCDOE should implement a streamlined settlement protocol that clearly delineates which entities/actors are responsible for milestones in the process and authorizes the individual representing NYCDOE in the impartial hearing to settle cases. This process should include a commitment from NYCDOE to empower its representatives to engage in true settlement discussions and settle cases, particularly where NYCDOE does not intend to put on a case.²⁸
8. **Implement Pendency Automatically.** NYSED/NYCDOE should end the practice of requiring hearings and pendency orders where pendency is uncontested.²⁹ Alternatively, NYSED and NYCDOE should investigate the development of an alternative track to handle pendency hearings with separate dedicated staff.
9. **Make Mediation and Alternative Dispute Resolution More Readily Available.** NYSED/NYCDOE should make mediation more readily available and accessible as a means to resolve cases without going to hearing, including by training Impartial Hearing Office staff and NYCDOE employees on the availability of alternative dispute resolution. Currently, NYCDOE “is not resolving or attempting to resolve enough matters through mediation.”³⁰
10. **Permit IHOs to Enter So-Ordered Judgments.** IHOs should have the authority to enter a so-ordered judgment against NYCDOE if an NYCDOE representative represents that NYCDOE does not intend to defend its failure to provide a free appropriate public education or does not object to the parent’s request for remedies. This judgment should then be directed to the Implementation Unit in order to streamline services and remedies for the student.

It is incumbent on both NYCDOE and NYSED to take immediate action on these priorities. The current pattern of extensive delays violates the procedural protections that federal and state law afford to our clients in precisely the manner these safeguards were designed to prevent. The legal responsibility for redressing these violations lies with both agencies.

We hope to work collaboratively with your offices to resolve our concerns and improve NYCDOE’s hearing process for all New York City children. Please note, however, that these egregious delays have impaired our clients’ rights under federal and state law, and we will consider all action necessary to seek redress on their behalf. We look forward to a reply by November 15, 2019, and to scheduling a meeting (or meetings) with you within thirty days of

²⁸ CAP, at 19 (“NYCDOE does not defend numerous cases at hearing, but rather admits that it did not provide [free appropriate public education] and does not offer to settle these cases.”).

²⁹ *Id.* (“NYSED has documented that NYCDOE requires a hearing or IHO determination for pendency, even when a student’s pendency is not in dispute.”).

³⁰ *Id.*, at 21.

this letter. Such a meeting should include, at a minimum, individuals from your agencies with knowledge of the problems described in this letter and the authority to commit to any agreed-upon solutions. Please address any reply to either Nelson Mar at nmar@lsnyc.org or Danielle Tarantolo at dtarantolo@nylag.org.

Sincerely,

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cc: Hon. Andrew M. Cuomo
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Hon. Letitia A. James
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(Comptroller, New York State)

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